

NOTICE: Summary decisions issued by the Appeals Court pursuant to its rule 1:28, as amended by 73 Mass. App. Ct. 1001 (2009), are primarily directed to the parties and, therefore, may not fully address the facts of the case or the panel's decisional rationale. Moreover, such decisions are not circulated to the entire court and, therefore, represent only the views of the panel that decided the case. A summary decision pursuant to rule 1:28 issued after February 25, 2008, may be cited for its persuasive value but, because of the limitations noted above, not as binding precedent. See Chace v. Curran, 71 Mass. App. Ct. 258, 260 n.4 (2008).

COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

18-P-1351

NANTAMBU KAMBON

vs.

SHELLY WILLIAMS<sup>1</sup> & another.<sup>2</sup>

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

On January 17, 2018, the plaintiff, an inmate in the custody of the Massachusetts Department of Correction (department), filed a complaint alleging that the defendants, individually and in their capacities as department employees, tampered with his mail and overcharged him for postage. On March 16, 2018, the defendants moved to dismiss the complaint for failure to state a claim upon which relief can be granted, Mass. R. Civ. P. 12 (b) (6), 365 Mass. 754 (1974). The plaintiff did not respond, and a judge of the Superior Court allowed the motion. On May 3, 2018, judgment entered dismissing the complaint.

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<sup>1</sup> Individually and in his official capacity as mail captain at Souza-Baranowski Correctional Center (SBCC).

<sup>2</sup> Steven Silva, individually and in his official capacity as superintendent of SBCC.

More than one month later, the plaintiff moved for reconsideration or, in the alternative, for relief from the judgment of dismissal. He also sought leave to file an amended complaint.<sup>3</sup> The plaintiff asserted that the defendants obtained the judgment of dismissal by fraud, having intentionally withheld his legal mail so that he had no knowledge of the motion to dismiss or of the court's ruling thereon until May 16, 2018.

The defendants filed an opposition to the plaintiff's motion that included an affidavit by defendant Shelly Williams, the administrative captain at SBCC, which described the manner in which inmate mail is distributed. Williams denied withholding the plaintiff's legal mail and attached copies of a legal mail log showing that the plaintiff received thirteen articles of legal mail between March and June, 2018. The plaintiff filed a response claiming that Williams's affidavit was perjurious. The plaintiff also submitted the affidavits of two inmates who disputed Williams's averments regarding the distribution of inmate mail.

The judge treated the plaintiff's motion as one for relief from judgment pursuant to Mass. R. Civ. P. 60, 365 Mass. 828

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<sup>3</sup> The original complaint did not identify specific theories of recovery or causes of action. The proposed amended complaint alleged various Federal and State civil rights violations and a violation of G. L. c. 93A.

(1974). On July 19, 2018, he denied the motion after concluding that "no grounds for relief have been presented." No action was taken on the motion for leave to amend the complaint.

On August 9, 2018, the plaintiff filed a notice of appeal from the judgment of dismissal and from the order denying relief from that judgment. However, the notice of appeal was not timely with respect to the judgment of dismissal which entered on May 3, 2018. See Mass. R. A. P. 4 (a) (1), as appearing in 481 Mass. 1606 (2019) (notice of appeal must be filed within sixty days of entry of judgment where parties are officers of the Commonwealth).<sup>4</sup> Our review is therefore limited to the judge's decision to deny the plaintiff relief pursuant to rule 60.<sup>5</sup> See Care & Protection of Georgette, 54 Mass. App. Ct. 778, 788 n.15 (2002), S.C., 439 Mass. 28 (2003) ("the appeal of an order denying relief under rule 60 [b] raises only the correctness of that denial, and the appellant may not attack the underlying judgment on a ground that [h]e might have raised had [h]e appealed"). We review the denial of a motion for relief

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<sup>4</sup> A motion for relief from judgment filed within ten days after the entry of judgment tolls the time period within which to file a notice of appeal. See Mass. R. A. P. 4 (a) (2) (C), as appearing in 481 Mass. 1607 (2019). Because the plaintiff's motion for relief from judgment was filed more than ten days after entry of judgment, it was not timely and did not toll the time period within which to appeal. Id.

<sup>5</sup> The plaintiff also claims error in the judge's denial of his motion for leave to amend the complaint. We decline to address that issue, as no action appears to have been taken on the motion.

from judgment for abuse of discretion. See Gaw v. Sappett, 62 Mass. App. Ct. 405, 408 n.5 (2004).

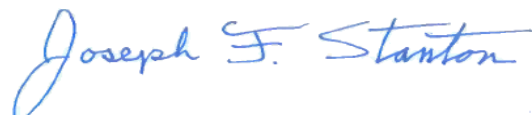
The plaintiff contends that the denial of his motion for relief from judgment was an abuse of discretion because the judgment of dismissal was obtained by fraud. See rule 60 (b) (3) (relief from judgment available based on "fraud . . . , misrepresentation, or other misconduct of an adverse party"). The plaintiff claimed that the defendants fraudulently withheld his legal mail so that he could not timely respond. "A party seeking to demonstrate fraud on the court must prove the most egregious conduct involving a corruption of the judicial process itself" (citation and quotation omitted). Sahin v. Sahin, 435 Mass. 396, 406 (2001). He must "clearly and convincingly" demonstrate "that [the defendant] has sentiently set in motion some unconscionable scheme calculated to interfere with the judicial system's ability impartially to adjudicate a matter by improperly influencing the trier or unfairly hampering the presentation of the opposing party's claim or defense" (citations and quotations omitted). Mt. Ivy Press, L.P. v. Defonseca, 78 Mass. App. Ct. 340, 349 (2010). "Clear and convincing proof . . . must be strong, positive and free from doubt[,] and full, clear and decisive" (citations and quotations omitted). Callahan v. Westinghouse Broadcasting Co., 372 Mass. 582, 584 (1977). It is a "heightened evidentiary standard,"

Matter of A.M., 94 Mass. App. Ct. 399, 400 (2018), as fraud is not presumed. Pina v. McGill Dev. Corp., 388 Mass. 159, 165 (1983). Here, the plaintiff failed to meet this heightened evidentiary standard.

The record shows that the plaintiff received thirteen items of legal mail in or around the time that the motion to dismiss and the judgment dismissing the complaint were served on him, and Williams has sworn under the pains and penalties of perjury that the plaintiff's legal mail was not withheld. The plaintiff offered no evidence that he did not receive his legal mail and the affidavits of his fellow prisoners are silent on that point. On this record, we cannot reasonably say that the denial of the motion for relief from judgment was an abuse of discretion.

Order denying motion for  
relief from judgment  
affirmed.

By the Court (Blake, Kinder &  
Desmond, JJ.<sup>6</sup>),

  
Clerk

Entered: July 1, 2019.

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<sup>6</sup> The panelists are listed in order of seniority.